

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 727 (GLOBAL
EXPERIENCE SPECIALISTS, INC.)

and

CASE 13–CB–73396

DANIEL KASPER, an Individual

Kevin McCormick, Esq., for the Acting
General Counsel.

Stephanie K. Brinson, Esq., of Park Ridge,
Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Chicago, Illinois on July 9 and 10, 2012. Daniel Kasper, an individual, (Kasper) filed the amended charge in Case 13–CB–73396 on February 21, 2012¹ and the Acting² General Counsel (General Counsel) issued the complaint on April 30, 2012.

Generally, the complaint alleges that the International Brotherhood of Teamsters, Local 727 (Local 727) failed to represent five employees of Global Experience Specialists, Inc. (GES) by requesting that GES entail these employees into a master seniority list that changed their seniority to new hire status. The complaint also alleges that Local 727 entered into an agreement with GES for these employees to be endtailed on the master seniority list and thus changing their status to new hire.

On the entire record, including my observations of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Local 727, I make the following:

¹ All dates are in 2012 unless otherwise indicated.

² The Acting General Counsel is referenced as General Counsel.

FINDINGS OF FACT

During the calendar year preceding the issuance of complaint, GES purchased and received goods and materials in excess of \$50,000 directly from points outside the State of Illinois. In its answer, Local 727 asserts that it has no knowledge of GES commerce facts. In its answer to a complaint filed in Cases 13–CA–75013 and 13–CA–75014, GES admits that it is an employer engaged in commerce within the meaning of 2(2), (6), and (7) of the Act. Although these two cases were initially consolidated for trial with 13–CB–73395, Respondent GES and the General Counsel reached a settlement just prior to the hearing and the General Counsel withdrew its complaint allegations concerning Respondent GES. I nevertheless find for purposes of this proceeding that at all material times, GES has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Local 727 admits and I find that the International Brotherhood of Teamsters Local 705 (Local 705) and Local 727 have been labor organizations with the meaning of Section 1(5) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

A. Procedural Background

As referenced above, Kasper filed a charge against Local 727 on February 21, 2012 generally alleging that Local 727 failed to represent its members by entering into an agreement with GES that adversely affected the seniority status of certain employees. On or about the same date, Kasper also filed charges 13–CA–75013 and 13–CA–75014 against GES alleging that GES had discriminated against employees because of the agreement with Local 727. Based on Kasper’s charges, the Acting General Counsel issued a complaint and notice of hearing against Local 727 on April 30, 2012 and a consolidated complaint and notice of hearing against GES on April 30, 2012. All matters included in the complaint, as well as the consolidated complaint, were scheduled to be heard in a consolidated hearing. Just prior to opening the record in this matter, GES and the General Counsel entered into a settlement and the General Counsel withdrew its complaint allegations against GES.

B. Issues

As counsel for Respondent points out in her brief, the facts in this matter are largely not in dispute. GES consolidated its warehouse operations and moved employees from its Roselle, Illinois facility and its Cicero, Illinois facility into a new facility that is identified as the Hodgkins facility. Local 727 does not deny that it requested that GES place the Roselle employees at the bottom of the master seniority list at the new facility and that it entered into an agreement with GES that provided for such decreased seniority for the Roselle employees. General Counsel asserts that Local 727 did so because these employees had not previously been members of Local 727 prior to the consolidation. Local 727 maintains that Local 727 did not discriminate against the Roselle employees because of the length of their membership in Local 727, but instead treated them differently because of their length of employment in the Hodgkins bargaining unit.

C. Background

GES is a division of Viad Corporation that produces trade shows and exhibition events. In providing exhibition services all over the United States, GES designs, builds, warehouses, and transports display and exhibition materials. Gary Behling (Behling) is Director of Labor Relations for GES and has worked for the employer since January 5, 2009. His duties involve the negotiation of collective-bargaining agreements between GES and unions for the eastern half of the United States. Prior to February 2012, GES maintained two facilities in the Chicago area with employees represented by two separate bargaining representatives. The employees who were responsible for warehousing duties at GES's Roselle, Illinois facility were represented by the International Brotherhood of Teamsters, Local 705 (Local 705). The employees who were involved in warehousing, driving and site work at GES's Cicero, Illinois facility were represented by the International Brotherhood of Teamsters, Local 727 (Local 727). As of December 8, 2011, Local 705 represented six warehouse employees at the Roselle facility and Local 727 represented 41 drivers, show, and warehouse employees at the Cicero facility.

D. Local 705's Agreement with GES

In the summer of 2011, Richard de Vires (de Vires) served as union representative for Local 705 and he had held representational responsibilities for GES employees since 1993. The collective-bargaining agreement between GES and Local 705 that pertained to the Roselle facility employees covered the period from June 1, 2010 through May 30, 2012. Section 15.3 of the agreement provides:

When the operations of two or more Employers are consolidated into a new business concern, the seniority standing of the Employees employed by the new business concern shall be determined by the names being sandwiched in one-for-one, starting with the most senior Employee in each company.

de Vires testified that the consolidation of seniority lists identified in Section 15.3 is accomplished by comparing the seniority lists from both facilities and identifying the employee who is the most senior for both lists. This employee is then designated as the employee with the most seniority for the new consolidated list. Then the second employee for the consolidated list is the most senior employee from the alternate list. The procedure requires alternating the employees by seniority from each list to add their names to the consolidated list. Thus, the employee's position on the consolidated list is based on the sandwiching of their rankings on the two respective lists. de Vires explained that this kind of sandwiching of employees into one consolidated seniority list is different from what is identified as "dovetailing" seniority. In dovetailing, the names of the employees in both seniority lists are consolidated and the order is determined by the employees' date of hire or date they reported to work. Dovetailing is based on straight seniority. As the record reflects, "end tailing" is the process by which an employee (or employees) is intentionally placed at the bottom of a seniority list when there is a consolidation of employees into one seniority list.

E. Local 705 and the GES Consolidation

As early as 2009, there had been industry rumors that GES was planning a reorganization strategy. On May 15, 2011, de Vires sent an email to Behling of GES, telling Behling that he had heard industry gossip that GES was taking over a facility in Hodgkins, Illinois. de Vires suggested that if that were true, some bargaining might be required and Behling should treat the email as a request to bargain over changes in terms and conditions of employment during the term of the existing contract between GES and Local 705. On June 27, 2011, Behling sent de Vires a letter confirming that GES was looking at the economic advantages of combining its Cicero and Roselle warehouses into a single facility located in Hodgkins, Illinois. Behling explained that if GES did so, the action would occur in or about November 2011 and all of the employees represented by Local 705 at Roselle and all of the employees represented by Local 727 at Cicero would transfer to the new facility. Behling suggested that if de Vires or other representatives of Local 705 wanted to meet and discuss the matter, GES representatives would be available during the first 2 weeks of August, 2011. de Vires responded to Behling's June 27, 2011 letter by making a formal request to bargain in an email dated July 5, 2011.

Between August 2011 and December 2011, GES and Local 705 exchanged proposals and then ultimately entered into a Memorandum of Understanding and Consolidation Agreement on December 8, 2011. The agreement provided that all of the Roselle bargaining unit employees would physically relocate to the Hodgkins facility on January 15, 2012, or as soon as practical thereafter. The Agreement also provided that the GES Roselle bargaining unit employees would be "sandwiched" into the master GES/727 seniority list, in accordance with the contractual agreement with Local 705. The consolidation agreement signed by GES and Local 705 also provided that the Master GES/727 seniority list would be implemented on January 1, 2012 and at that time all employees would be covered by the labor agreements between GES and Local 727. The existing agreement between Local 705 and GES would expire on December 31, 2011. The agreement would not be renewed and the bargaining relationship between Local 705 and GES would terminate on that date.

F. Local 727 and the Consolidation

Local 727 has represented the Cicero bargaining unit employees since 2008³. John Coli (Coli) is the President and Business Manager for Local 727. Michael Jain (Jain) has been employed with Local 727 for approximately 2 years and he is the business representative for the GES bargaining unit. As of November 2012, the collective-bargaining agreement between GES and Local 727 had an expiration date of December 31, 2013. Articles 6.1 and 6.4 of the agreement provide that an employee's seniority is calculated on the basis of the employer's date of union acceptance. Coli testified that seniority under the agreement is defined as the length of time an employee has been working for the employer as a member of the union.

³ By agreement with the International Brotherhood of Teamsters Local 714, Local 727 assumed the bargaining responsibility for the Cicero bargaining unit prior to the dissolution of Local 714.

In or around June of 2011, Behling sent Jain written notice that GES was considering the warehousing move. Coli later received a letter from Behling confirming that GES planned to move its warehousing operation to the Hodgkins facility. In August 2011, Behling contacted Jain concerning a meeting scheduled at the Roselle facility that would be attended by GES representatives and Local 705. Jain testified that he was not invited to be a participant at the meeting; only an observer. Jain also testified that de Vires instructed him that he was not to negotiate or speak on behalf of Local 705. Jain attended the August meeting, as well as one additional meeting in October 2011, in which he also attended as an observer. There is no evidence that Jain participated in the meetings to any greater capacity than as an observer.

When Coli spoke with Behling in November 2011 concerning the consolidation, Behling remarked that there would be more employees coming from Cicero than from Roselle. He asked Coli's opinion as to who would be the bargaining representative. Coli testified that he suggested a unit clarification petition. On December 6, 2012, Coli, on behalf of Local 727, filed a unit clarification petition with the National Labor Relations Board (the Board) and a hearing was ultimately scheduled for January 30, 2012.

G. The Implementation of the Seniority List

Daniel Kasper began working for GES on October 12, 1983. Kasper worked at the Roselle facility from 1994 until January 31, 2012, before he was transferred to the Hodgkins facility. Kasper testified that on January 2, 2012, he spoke with his production manager; Larry Roberts in the Roselle traffic department about seniority. Roberts told him that he had just received the new seniority list from GES Traffic Coordinator Scott Anderson. Using the new seniority list, Roberts asked Kasper and other Roselle employees if they wanted to take a job working at a trade show at the McCormick Place in Chicago. Kasper testified that neither he nor the other Roselle employees had previously worked a trade show. All five of the Roselle employees declined the job and opted to remain at Roselle to complete their move to the Hodgkins facility. Following Roberts' conversation with Kasper, Roberts also emailed the new seniority list to Kasper. The list that Kasper received was captioned "Teamster Seniority List Effective 1-30-12." Roselle employee Jerold Wolhardt was listed as the second name on the seniority list and Kasper was listed as the fourth name on the list. Roselle employees Raymond Carl, Frank Gajewski, and James Grung were included on the list in the sixth, eighth, and tenth slots respectively. Behling testified that the seniority list was created between Christmas 2011 and New Year's Day on 2012 and posted somewhere in the warehouse area.

In an email dated January 3, 2012, Jain informed Behling that it had come to his attention that a GES Teamster seniority list that included both the Local 727 bargaining unit employees and the Local 705 bargaining unit employees had been posted. Jain asserted that as of that date Local 727 did not have any agreement with GES concerning the integration of the Local 705 bargaining unit employees. Jain demanded that the Local 705 employees perform what was previously considered Local 705 bargaining unit work until an agreement had been reached. Jain went on to add that any instance where a Local 705 bargaining unit

employee performed Local 727 bargaining unit work would be viewed as a violation of the contract between GES and Local 727. In a follow-up email on January 3, 2012, Behling told Jain that he had spoken with the General Manager who agreed that until the employee groups move into one building, GES employees would continue doing the work they had previously done. When Jain responded, he stated "Honestly, until we have an agreement, we won't be accepting the 705 group into our bargaining unit, regardless of what building their all working in."

Kasper testified that on the same day that Roberts offered him the trade show work at McCormick Place, Roberts came back to him and reported that the seniority list had been pulled. Roberts told him that the Roselle employees were no longer going to be offered work outside the Roselle facility until they actually moved to the Hodgkins facility.

In an email to Behling dated January 4, 2012, Jain attached a signed copy of a voluntary recognition agreement, recognizing Local 727 as the bargaining representative for the bargaining unit employees at the Hodgkins facility. The wording of the proposed agreement provided that the five members of Local 705 would be transferred to the Local 727 bargaining unit at the new Hodgkins' facility and that the contract between Local 727 and GES would apply to the new bargaining unit at the Hodgkins facility. The agreement forwarded to Behling included Coli's signature and signature lines for both Behling and a representative of Local 705.

Behling did not sign the document and return it to Coli as Coli's letter suggested. Behling recalled that it was not until he came to the Board's regional office on January 30, 2012 for the unit clarification hearing that he actually signed the document. Behling testified that the document was placed before him in the January 30, 2012 meeting and he was urged to sign it as there was agreement that Local 727 was going to be the union representative. Behling did not know if the document was shown to Local 705, however, he recalled that representatives from Local 705 were in attendance. There is no record evidence that representatives of Local 705 signed the agreement that Behling signed on January 30, 2012.

H. The New Seniority List

Kasper testified that on January 31, 2012, Roberts telephoned him and told him that he wanted to talk with him personally about a new seniority list that had been emailed to him. When Roberts arrived at the Roselle facility, he showed Kasper the seniority list from Roberts' Blackberry. Kasper's name was listed as fourth from the bottom.

After meeting with Roberts, Kasper spoke with Jain by telephone. Kasper asked Jain when the Roselle employees would be able to join Local 727 because they would be moving to the Hodgkins facility the next day. Kasper also asked Jain why the Roselle employees had been placed at the bottom of the seniority list. Kasper testified that Jain told him that the Roselle employees were new to Local 727 and that the Roselle employees were placed at the bottom of the seniority list because their hire date was January 31, 2012.

I. Local 727's Consolidation Agreement with GES

On March 1, 2012, Coli and Behling signed a consolidation agreement. The agreement provided that the GES Roselle bargaining unit employees would be integrated into the Master/727 Seniority List in accordance with Article 6 of Local 727's collective-bargaining agreement and that the Master GES/727 Seniority List would be implemented effective February 1, 2012, whether or not the move had been completed. Article 6 of the Local 727 contract, as referenced in the consolidation agreement, provides that the seniority status of individual employees is calculated on the basis of the employee's date of union acceptance. The consolidation agreement specified that the GES Roselle bargaining unit employees would retain their original Roselle seniority dates for purposes of vacation only. Furthermore, the consolidation agreement further clarified that within a month following the physical transfer to the Hodgkins facility, the Roselle bargaining unit employees were required to execute a request to transfer membership to Local 727 and to execute a dues checkoff provided by Local 727.

On March 1, 2012, Local 727 scheduled an employee meeting to vote on the consolidation agreement. Twenty-two employees voted by secret ballot. Coli testified that three of the Roselle employees participated in the vote. There were 12 votes cast to ratify the agreement and 10 votes cast to reject the agreement.

J. The Effect of the Reduced Seniority for the Former Roselle employees

Article 6.5 of the existing collective-bargaining agreement between GES and Local 727 provides that seniority shall prevail in all cases of layoff. Local 727's consolidation agreement with GES provides that the Master GES/727 Seniority shall also govern for layoff. On February 8, 2012, GES laid off former Roselle employees Daniel Kasper, Raymond Carl, Frank Gajewski, and James Grung. On February 10, 2012, these same employees, as well as former Roselle employee Jerold Wohlar dt, were laid off. On February 22, 2012 GES also laid off Grung, Kasper, Carl, and Gajewski and on February 24, 2012, GES laid off Wohlar dt, Grung, Kasper, Carl, and Gajewski. Finally, on April 10, 2012, GES laid off employees Wohlar dt, Kasper, Carl, Grung, and Gajewski. Kasper testified that during the period between February 8, 2012 and April 10, 2012, he was laid off for approximately 29 days. Gajewski testified that he was laid off during this same period for 31 days. Although the record does not contain the specific date, the seniority list was changed after April 10, 2012, and Kasper resumed working without layoff interruptions. Kasper testified that he was ultimately moved back to the fourth slot on the seniority list.

Both Kasper and Gajewski testified that during the time that they were at the bottom of the seniority list, they did not receive 401(k) contributions and they lost vacation. Kasper testified that he had 6-1/2 weeks of vacation when he left the Roselle facility. When he began working at the Hodgkins facility, his vacation was reduced to zero. His vacation was later restored to 4-1/2 weeks. Gajewski testified that during the period when he was at the bottom of the seniority list, one of his wife's insurance claims was denied.

K. Whether Respondent's Actions Violated the Act

1. The allegations

5 The General Counsel alleges that Local 727 took action against employees Wohlar
Kasper, Carl, Gajewski, and Grung because of their affiliation with Local 705 and because of
their length of membership in Local 727. Specifically, the General Counsel alleges that since
February 12, 2012, Local 727 has failed to fairly represent employees Wohlar, Kasper, Carl,
Gajewski, and Grung by entering into an agreement with GES that caused the named
10 employees to be entailed on the Hodgkins master seniority list and thus changing their
seniority to new hire status. In Local 727's doing so, the General Counsel contends that Local
727 selected these same employees for layoff and affected their healthcare and vacation
benefits. Furthermore, the General Counsel alleges that about February 2012, Local 727
requested that GES "entail" these same 5 employees on the Hodgkins master seniority list;
15 changing their status to new hire.

2. Local 727's arguments

20 In defense of its actions, Local 727 argues that the Roselle employees were never
previously in a bargaining unit represented by Local 727 and that Local 727's actions in
response to the merger were appropriate and lawful. Local 727 asserts that it filed a unit
clarification petition so that no confusion would remain as to the proper bargaining
representative for these Roselle employees. Furthermore, Local 727 contends that it was not
obligated to recognize the ineffective agreement that Local 705 negotiated with GES and that
25 it negotiated a lawful agreement with GES. Finally, Local 727 asserts that Local 705's
agreement with GES is improper under the constitution of the International Brotherhood of
Teamsters and the bylaws of Local 727.

30 First of all, I agree that Local 727 was not obligated to recognize the agreement that
Local 705 negotiated with GES. While the agreement provided for a process of sandwiching
the seniority status for the Roselle employees and the Cicero employees for the merged
bargaining unit, the agreement included only two of the three parties affected by the
agreement. As Local 727 points out in its brief, the agreement between GES and Local 705
concerning the working conditions of employees represented by Local 727 was not binding on
35 Local 727. Because I don't otherwise find the agreement between GES and Local 705
binding on Local 727, I find no need to address Local 727's argument concerning the
legitimacy of the agreement with respect to the Union's constitution or bylaws.

40 In support of its argument that it acted lawfully in negotiating its agreement with GES
that provided for entailing the seniority of the Roselle employees, Local 727 relies on the
decision of the Seventh Circuit Court of Appeals in *Schick v. NLRB*, 409 F.2d 395 (7th Cir.
1969). In that decision, the court upheld the Board's decision finding no violation despite the
union's involvement in causing the entailing of the seniority for employees brought into a
bargaining unit from a rival union. Local 727 asserts that the facts of *Schick* are identical to
45 those in the current case and thus the complaint should be dismissed as in *Schick*.

While there are corresponding issues in both cases, I do not find the facts of the *Schick* case to be sufficiently similar to support Local 727's arguments. In *Schick*, the employer had separate bargaining units with Teamsters' Local 705 and Teamsters Local 710. The 705 agreement covered employees performing delivery of dry freight and the 710 contract covered employees engaged in meat hauling. Separate seniority lists were maintained for each unit. During the 1950's, the employer began increased dry-freight hauling and less meat hauling and the employer then assigned 710 drivers to perform dry-freight work. Local 705 protested that the 710 drivers were performing work that was within its jurisdiction. In 1962, attempts by the 710 drivers to transfer into 705 were successfully opposed by both Local 710 and the employer. In 1964, the employer merged with another employer and the Local 710 drivers were told that they would have to transfer to Local 705 to perform work that was within 705's jurisdiction. They were also told that they would have to go to the bottom of the seniority list. When the 710 drivers met with 705 representatives, they were told that they would participate in the 705's health and welfare benefits immediately and that 705 would try to get them pension benefits as well. Furthermore, the top six drivers on the 710 seniority list would stay in 710 and keep their seniority, although they would perform dry-freight work. The remaining 12 drivers would transfer to 705 and go to the bottom of the 705 seniority list.

The court found that the record did not support a finding that the 710 employees were given inferior seniority rankings because of their union affiliation. The court found that the 710 employees were placed at a disadvantage, not because they were members of another union, but because they were members of another unit. The court went on to point out that the fact that a substantial majority of the work of the 710 drivers consisted of dry-freight hauling did not make them members of the unit represented by 705, inasmuch as 705 had protested the infringement and had, at one point, pressed its complaint so far as to forbid the employer to utilize 710 drivers for overtime work in the dry-freight category. Thus, unlike the circumstances involved in the instant matter, the work performed by the two bargaining units in *Schick* was very much an issue of dispute between the two unions long before the merger. Under those circumstances, it is reasonable that the court held that the change in seniority resulted from the need to protect the integrity of the unit represented by 705 rather than from an arbitrary discrimination based on their past union affiliation.

In an attempt to draw an analogy with the circumstances in the *Schick* case, Local 727 argues that the Roselle bargaining unit employees did not perform the same work as the Cicero employees until after they were transferred to the Hodgkins facility. Specifically, Local 727 argues that prior to the merger, Roselle employees were engaged primarily in pulling property from storage, filling orders, loading trucks, and unloading trucks while the Cicero employees were also involved in transporting the materials to the trade shows. Furthermore, Local 727 contends that similar to the circumstances of the *Schick* case, it protested anyone other than its bargaining unit members performing bargaining unit work unless and until it was the proper and exclusive bargaining representative. Local 727 points to the fact that after the first seniority list was posted on January 3, 2012, Jain protested the "sandwiching" of the Roselle and the Cicero employees for seniority.

While the record reflects that the work performed by the employees at the Cicero facility included some additional duties involving the trade shows, the overall record does not

suggest that the Roselle and Cicero bargaining units were divergent entities with a distinct jurisdictional friction as that found in *Schick*. Furthermore, Jain’s response to the January 3, 2012 posting of the seniority list was simply an objection to including both the Local 705 employees and the Local 727 employees on the same list before Local 727 had an agreement with GES or with any entity concerning the integration of the Local 705 employees. His objection came at a time when there had been no resolution of the unit clarification petition and before GES and Local 727 had reached any agreement concerning the integration of the Local 705 employees. His objection under these circumstances is not analogous to the long-standing jurisdictional dispute between the unions that was considered by the Board and the court in *Schick*.

Furthermore, both the judge in his decision and the court in its decision in *Schick* placed great significance on the fact that the employer and Local 705 found a resolution through collective bargaining. The court specifically noted that the final solution for the jurisdictional dispute was a compromise and that it was the product of collective bargaining which the court was upholding in its decision. In the instant case, there is no evidence that the recognition agreement signed by Local 727 and GES came after any meaningful bargaining. As Behling testified, the voluntary recognition agreement was first sent to him in an email on January 3, 2012. He did not, however, sign it until the date of the unit clarification hearing on January 30, 2012. He testified that the agreement was placed before him and after it was pointed out to him that Local 727 would ultimately be the representative for the employees, he signed the document. The unit clarification hearing never opened and no decision issued with respect to the representation case.

The recognition agreement between Local 727 and GES provides that the collective-bargaining agreement between Local 727 and GES would apply to the bargaining unit at the Hodgkins warehouse. Article 6.4 of the collective-bargaining agreement specifically states that the seniority status of employees is determined on the basis of “the employee’s date of union acceptance.” Coli testified that Article 6 of the collective-bargaining agreement means the length of time in which an employee has been working for the employer as a member of the union according to the contract. On March 1, 2012, Local 727 and GES signed a consolidation agreement that was retroactive to February 1, 2012. While the agreement integrated the Roselle employees into the Master GES/727 seniority list, it did so in accordance with Article 6 of the existing Local 727 collective-bargaining agreement. Thus, the consolidation agreement continued the provisions of the recognition agreement in reducing the Roselle employees’ seniority to the date of union membership. The consolidation agreement provided that the Roselle employees would retain their original Roselle seniority dates for purposes of vacation only.

Coli testified that in the later part of February 2012, he met with Behling to discuss his concerns about how the move would be handled and to bargain about the effects of the move. There was, however, no evidence that there was any bargaining about the seniority of the Roselle employees. There is nothing to indicate that Local 727 ever discussed or considered any position on seniority for the Roselle employees other than what it first proposed to GES on January 3, 2012. Therefore, while GES and Local 727 signed two agreements that affected the Roselle bargaining unit employees, there was no evidence that there was any meaningful

bargaining or compromise concerning these employees seniority as was recognized and relied on by the court in the *Schick* case. As early as January 3, 2012, Local 727 presented GES with its demand that the Roselle employees would become a part of the Hodgkins bargaining unit with less seniority than the Cicero employees. Local 727's position on the seniority did not change and continued through the signing of the consolidation agreement on March 1, 2012.

Furthermore, I do not find that the March 1, 2012 vote validates Local 727's otherwise unlawful conduct. Citing the Board's decision in *Teamsters Local 435 (Super Value, Inc.)*, 317 NLRB 617 (1995), the General Counsel points out that a union cannot decide an issue before it by having those employees who could be adversely affected by the resolution of the issue, notwithstanding their obvious conflict of interest, vote to decide the issue. It is of no consequence that Kasper and Gajewski were present or participated in the vote. Clearly, they were going to be negatively affected by the agreement and they were outnumbered by the previous members of Local 727 who would surely want their seniority to remain intact. Counsel for the General Counsel argues that by placing this consolidation agreement up for a vote, Local 727 knew that it would pass in favor of the stronger, majority group and thus further violated the Act⁴.

Accordingly, I do not find the circumstances of the instant case to be significantly similar to those before the Board and the court in *Schick*. In summary, I don't find that *Schick* or other case authority cited by Local 727 support a dismissal of the complaint as argued by Local 727.

3. The case authority in support of the General Counsel's allegations

Since as early as 1964, the Board⁵ has found that it is unlawful in a unit merger situation to enttail employees who were not formerly represented by a union. *Whiting Milk Corp.*, 145 NLRB 1035 (1964). The facts in *Whiting Milk* involve an employer that acquired another company having five separate facilities. At four of the acquired facilities, the employees were represented by a union and at the fifth facility, the employees were unrepresented. In conformity with a provision of the collective-bargaining agreement in place, the former employees of the four union-represented facilities were given preferred seniority status over those employees who were previously unrepresented. When a layoff came about, the previously unrepresented employees were selected for layoff in accordance with the contractual provision that caused them to be at the bottom of the seniority list. Despite the fact that the layoff was fully in accord with the collective-bargaining agreement, the Board found that the layoff of the previously unrepresented employees was substantially related to their earlier lack of membership in the union of the acquiring employer and thus unlawful.

⁴ Although Counsel for the General Counsel contends in his brief that the vote was a separate violation, this action is not alleged as a separate violation in the underlying complaint. While I do not find the vote to absolve Local 727 for its unlawful conduct, I do not find the vote to constitute a separate violation.

⁵ The Board's decision was not enforced by the First Circuit Court of Appeals. *NLRB v. Whiting Milk Corp.*, 342 F.2d 8 (1st Cir. 1965).

The Board has continued to find that not only is preference based on union membership vs. nonmembership unlawful, but that preferences granted on the basis of any membership considerations is unlawful. In *Reading Anthracite Company (United Mineworkers of America, Local 807)*, 326 NLRB 1370 (1998), a local of the international union was merged into another local for a single unit. The surviving local caused the employer to assign all the former local members seniority dates that reflected the day they joined the surviving local and not the dates that they began work at the mine. The Board found the local's action to violate the Act, noting that it was unlawful to use membership considerations to determine conditions of employment and that such conduct violated Section 8(b)(2) of the Act by discriminatorily encouraging membership in that local.

Local 727 argues that the facts of *Reading Anthracite* are distinguishable from the instant case. Counsel argues that the Roselle employees transferred into a bargaining unit already existing at the time of their transfer. Counsel also argues that unlike the transferring employees in *Reading Anthracite*, the Roselle employees in the instant case took on the additional job duties after they transferred to the Hodgkins location. I do not find these facts significantly distinguishable from those before the Board in *Reading Anthracite*. In both cases, the position on the seniority list for one group of merging employees was governed by an irrelevant and discriminatory consideration; the date they became members or came to be represented by a specific union. Thus, I find the Board's decision in *Reading Anthracite* to support a finding that there was unlawful entailing in the instant case.

The Board's current view on this issue is best seen in its recent decision in *Interstate Bakeries Corp.*, 357 NLRB No. 4 (2011). In that case, the union represented sales representatives in two separate bargaining units that also had separate contracts. After deciding to consolidate its service routes, the employer entered into an agreement with the union to also merge the bargaining units. The agreement provided for dovetailing the seniority of the union employees from both bargaining units. At some point it was discovered that there was one employee in the new merged unit who had not been previously included in either of the two previous bargaining units. Despite the fact that the employee had the greater company seniority, the employer and union agreed that he would be placed at the bottom of the newly created seniority list for the newly merged bargaining unit. The employee was additionally told that the employer and the union would use union seniority as a criterion for selecting employees for route eliminations. Because of his reduced seniority, the employee lost his position at the plant where he worked and he was forced to commute to another plant that was farther away.

In finding a violation, the Board explained that in the context of a unit merger, a union and an employer cannot discriminate against all or even some of the merged employees on the basis of their previously unrepresented status. The Board addressed its earlier decision in *Whiting Milk* and clarified that it is unlawful for parties to place employees at the end of the seniority list because they were unrepresented by a particular union or any union in their prior employment. In its decision, the Board acknowledged that the union was legitimately concerned about its duty to the employees it already represented. The Board nevertheless

followed its earlier decisions in *Whiting Milk*, as well as other relevant cases,⁶ in holding that “in the context of a unit merger, a union and an employer are not lawfully permitted to discriminate against all, or in this case, some of the merged employees on the basis of their previously unrepresented status.” *Interstate Bakeries* at 6.

Counsel for Local 727 argues that the facts in *Interstate Bakeries* are not present in the instant matter. Counsel asserts that in *Interstate Bakeries*, there were three distinct units and that all bargaining units were merged into one new unit. Counsel maintains that in the instant case, all employees merging into the already existing Cicero unit were treated the same. Furthermore, Local 727 asserts that there is not a new unit in the instant matter because the Local 705 dissolved and the Roselle employees were transferred into the already existing Local 727 unit. Although there is no dispute that Local 705 eventually ceased to represent the Roselle employees after they were relocated to the Hodgkins facility, there was nevertheless a merging of the two groups of employees into one bargaining unit at the Hodgkins facility. The fact that Local 705 relinquished its representation of the Roselle employees does not negate the fact that employees from two previous bargaining units at two separate locations were joined together at a new location to perform work directed by the employer. Local 727’s argument that there was not a merger is a distinction without a difference with respect to these circumstances.

Furthermore, in its decision in *Interstate Bakeries*, the Board actually addressed this same issue. In his initial decision in the case, the administrative law judge did not find a violation, holding that the union discriminated based on unit rather than union seniority. The judge relied on the fact that the union had not said or done anything that could be deemed inconsistent with the union president’s express rationale for the union’s treatment of the previously unrepresented employee as a new unit employee. Furthermore the judge observed that the union in question had always required bargaining unit members who left and then returned to forfeit their unit seniority and come back into the unit at the bottom of the seniority list. The Board found the judge’s analysis to be flawed as it failed to recognize that neither unit continued to exist as it had before, once all of the employees were merged into a single unit under a collective-bargaining agreement for employees previously represented. *Interstate Bakeries* at 5.

Local 727 argues there is no evidence that it was motivated by any hostile, invidious, irrelevant, or unfair considerations. Local 727 asserts that it simply entered into an agreement with GES that related to overall seniority that recognized and appropriately applied the definition of seniority in the collective-bargaining agreement that was already in place. Notwithstanding Local 727’s assertion, I also note that proof of good faith on the part of a union is not a defense to a charge based on the duty of fair representation since arbitrary conduct without evidence of bad faith has been found to constitute a breach of the duty. *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976).

⁶ *Teamsters Local 435 (Super Valu, Inc.)*, 317 NLRB 617 fn. 3 (1995); *Teamsters Local 480 (Hilton D. Wall)*, 167 NLRB 920, 920 fn. 1 (1967); *Woodlawn Farm Dairy Co.*, 162 NLRB 48, 50 (1966).

In reaching a decision in this case, I am aware of the fact that in matters of labor law a respondent may be found to have acted unlawfully, and yet ironically, there is no obvious counter action that is clearly mandated. Certainly, as Local 727 points out, a union may lawfully affect employees' seniority without violating the Act and such action may even involve endtailing as a means of reconciling the seniority for employees in a merged unit. In determining that Local 727's actions violate the Act, I cannot say with certainty that Local 727 was legally required to agree to dovetailing or sandwiching the seniority for the Roselle employees. I can only determine that the record supports a finding that Local 727 took the actions that it did because the Roselle employees were not members of Local 727 before the merger. Thus, it is the grounds for Local 727's action, rather than the specific action, that triggers the violation with respect to the specific facts of this case.

Therefore, based on the record evidence described above, I find that since about February 2012, Local 727 has failed to fairly represent employees Wohlarth, Kasper, Carl, Gajewski, and Grung by entering into an agreement with GES that caused these employees to be entailed on the Hodgkins master seniority list which changed their seniority to that of new hire status. Additionally, I find that about February 2012, Local 727 attempted to cause and caused GES to entail these same employees on the Hodgkins seniority list and change their status to new hire. The record reflects that Local 727 did so because of the length of membership in Local 727. Accordingly, I find that Local 727 has violated Sections 8(b)(1)(a), 8(b)(2), and 2(6) and (7) of the Act.

Conclusions of Law

1. International Brotherhood of Teamsters, Local 727 and International Brotherhood of Teamsters Local 705 are labor organizations within the meaning of Section 2(5) of the Act.

2. Global Experience Specialists, Inc., (GES) is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By entering into an agreement with GES that caused Jerry Wohlarth, Daniel Kasper, Raymond Carl, Frank Gajewski, and James Grung to be entailed on the Hodgkins master seniority list and changing their seniority to new hire status, Local 727 violated 8(b)(1)(a) of the Act.

4. By requesting GES to entail Jerry Wohlarth, Daniel Kasper, Raymond Carl, Frank Gajewski, and James Grung on the Hodgkins master seniority list and change their status to new hire, Local 727 violated Section 8(b)(2) of the Act.

Remedy

Having found that Local 727 has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Local 727 shall make whole⁷, with interest, Jerry Wohlaradt, Daniel Kasper, Raymond Carl, Frank Gajewski, and James Grung for any loss of earnings or other benefits that they may have suffered for the period of time in 2012 when their seniority was discriminatorily endtailed to the bottom of the GES/727 master seniority list in accordance with the method set forth in *F.W. Woolworth Company*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom. Jackson Hospital Corp. v. NLRB, 647 F. 3d 1137 (D.C. Cir. 2011).

To the extent that GES and Local 727 have not already done so, Local 727 shall rescind its agreement for the above-named employees to be endtailed at the bottom of the GES/727 master seniority list. To the extent that GES and Local 72 have not already done so, Local 727 shall withdraw its request that the seniority of these employees be endtailed into the GES/727 master seniority list.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:⁸

ORDER

Respondent International Brotherhood of Teamsters, Local 727, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Attempting to cause or causing GES or any other employer from endtailing employees to a lesser position on the master seniority list because of their length of membership in Local 727.

(b) Entering into an agreement with GES or any other employer that causes employees to be endtailed to a lesser position on the master seniority list because of their length of membership in Local 727.

⁷ The record reflects that the General Counsel and GES entered into a settlement agreement to resolve the allegations in Cases 13–CA–75013 and 13–CA–75014, however, the details of that settlement were not included as a part of the record in this matter. To the extent that the Board’s settlement with GES provides for joint and several liabilities, the remedy includes Local 727’s obligation for joint and several liabilities. Otherwise, Local 727 is responsible for fully remedying any losses resulting from the discrimination found above. The procedure for determining the exact amount of liability owing by Local 727 is therefore left to the Board’s compliance function.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order, as provided in Section 10.48 of the Rules, shall be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing members in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Notify GES that it does not seek employees' placement on a master seniority list on the basis of the length of membership in Local 727.

(b) Make Jerold Wohlarth, Daniel Kasper, Raymond Carl, Frank Gajewski, and James Grung whole for losses incurred as a result of the discrimination against them in the manner specified in the remedy section of this decision.

(c) Within 14 days after service by the Region, post at its office within the jurisdiction of Local 727, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by Local 727's authorized representative, shall be posted by Local 727 and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by Local 727 to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on forms provided by the Region attesting the steps that Local 727 has taken to comply.

Dated, Washington, D.C., December 18, 2012.

Margaret G. Brakebusch
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT attempt to cause or cause Global Experience Specialists, Inc., or any employer to reduce employees' seniority because of their length of membership in Local 727.

WE WILL NOT enter into an agreement with Global Experience Specialists, Inc., or any other employer to reduce employees' seniority because of their length of membership in Local 727.

WE WILL notify Global Experience Specialists, Inc., that we rescind any previous requests for Jerold Wohlar dt, Daniel Kasper, Raymond Carl, Frank Gajewski, and James Grung to be placed at the bottom of the GES/727 master seniority list.

WE WILL notify Global Experience Specialists, Inc., that we rescind our agreement to place Jerold Wohlar dt, Daniel Kasper, Raymond Carl, Frank Gajewski, and James Grung at the bottom of the GES/727 master seniority list.

WE WILL make whole Jerold Wohlar dt, Daniel Kasper, Raymond Carl, Frank Gajewski, and James Grung for losses they incurred as a result of the discrimination against them.

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 727**

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

209 South LaSalle Street, Suite 900, Chicago, IL 60604-1443
312) 353-7570, Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.